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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 198

ISADORE M. KRACHOCK,

Appellant,

vs.

DEPARTMENT OF REVENUE,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

JURISDICTIONAL STATEMENT

May It Please the Court:

In support of the jurisdiction of this Court to review the above-entitled cause on appeal, Appellant respectfully represents:

(a) Statutory Provision Sustaining Jurisdiction

This appeal is within the jurisdiction of this Court under the terms of Title 28, United States Code, Section 1257, which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

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repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The facts in the case at bar are simple: The Plaintiff-Appellant applied to the Department of Revenue, an administrative agency of the State of Illinois, for a Motor Fuel Distributor's license. The Department of Revenue refused to give him a license, claiming that there was due from the Plaintiff to the State the sum of $742.59. The Plaintiff denied that he owed the State any money and asked that the Department of Revenue give him a hearing to determine this question. The Department of Revenue refused to give him a hearing and refused to give him a license, (Record Pages 3-6). In his complaint, the Plaintiff-Appellant alleged (Record 5):

"Plaintiff desires a judicial review of the decision of the Department of Revenue refusing a hearing to the plaintiff and refusing to issue a license to the plaintiff.

"Said decision of the Department of Revenue which was rendered without a hearing and without an opportunity to be heard is in direct violation of due process of law as guaranteed to the plaintiff by Article II, Section 2 of the Illinois Constitution of 1870 and the 14th Amendment to the Constitution of the United States of America."

To the complaint of the Plaintiff-Appellant, which was filed in the Circuit Court of Cook County, Illinois, the Defendant-Appellee filed a motion reading as follows (Record 14-15):

"Now comes Paul C. Rosenquist, Director of Revenue of the Department of Revenue of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, and enters his special, limited and restricted

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appearance for the sole purpose of challenging the jurisdiction of this court in the above entitled cause, and moves the court to quash the complaint and to dismiss the cause • • •

"Wherefore, the defendant, on account of the want of jurisdiction, averred, moves this Honorable Court that the complaint be quashed and the proceedings dismissed."

Thereafter a judgment was entered (Record 21) that:

"It is hereby ordered that said motion of defendant be and is hereby sustained and the complaint is quashed and the suit dismissed at plaintiff's costs, to the entry of which order the plaintiff objects and excepts."

Section 1 of the Illinois Motor Fuel Tax law (Ill. Rev. Stat. 1947, Chap. 120, Sec. 417) provides:

"For the purposes of this Act: • • • 'Department' means the Department of Revenue of the State of Illinois."

Section 3 of the Illinois Motor Fuel Tax law (Ill. Rev. Stat. 1947, Chap. 120, Sec. 419) provides:

"No person shall act as a distributor of motor fuel within this State, without first securing a license to act as a distributor of motor fuel, from the Department. Application for such license shall be made to the Department upon blanks furnished by it."

Section 15 of the Illinois Motor Fuel Tax law (Ill. Rev. Stat. 1947, Chap. 120, Sec. 431) provides:

"Any person who acts as a distributor of motor fuel without having a license so to do; . . . shall be punished by a fine not to exceed $5,000.00 or by imprisonment in the penitentiary for not less than one year nor more than five years, or by both such fine and imprisonment."

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Section 16(a) of the Illinois Motor Fuel Tax law (Ill. Rev. Stat. 1947, Chap. 120, Sec. 432a) provides:

> "The provisions of the 'Administrative Review Act', enacted by the 64th General Assembly and all amendments and modifications thereof, and the rules adopted pursuant thereto, shall apply to and govern all proceedings for the judicial review of final administrative decisions of the Department hereunder."

Section 1 of the Illinois Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 110, Sec. 264) provides:

> "For the purpose of this Act '*Administrative Agency*' *means* a person, body of persons, group, officer, board, bureau, commission or *department* (other than a court, judge, justice of the peace or magistrate) of the State, or of any political subdivision thereof or municipal corporation therein, having power under law to make administrative decisions." (Emphasis ours).

Section 2 of the Illinois Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 110, Sec. 265) provides:

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. *In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.*" (Emphasis ours).

The Illinois Department of Revenue was made a party defendant in accordance with Section 8 of the Illinois Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 110, Sec. 271) which provides:

> "(Defendants). In any action to review any final decision of an administrative agency, the *administrative agency* and all persons, other than the plaintiff, who

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were parties of record to the proceedings before the administrative agency *shall be made defendants.*" (Emphasis ours).

Rule 71 of the Supreme Court of Illinois likewise requires that the administrative agency from whose decision a review is sought be named as a defendant.

The opinion of the Supreme Court of Illinois in the case at bar recites as follows (403 Ill. 148, 149, 153-154):

"This is an appeal from an order of the circuit court of Cook County quashing a complaint purportedly filed under the Administrative Review Act, and dismissing the plaintiff's suit.

"Plaintiff, Isadore M. Krachock, filed his complaint against the Department of Revenue to compel it to issue a license to him as a distributor under the Motor Fuel Tax Act. (Ill. Rev. Stat. 1947, Chap. 120, Par. 417 *et seq.*). The complaint purports to be in accord with the Administrative Review Act, (Ill. Rev. Stat. 1947, Chap. 110. Pars. 264-279 incl.) which authorizes a review of the final decisions of administrative boards or bureaus, when such decisions affect the rights, privileges or duties of the person appealing therefrom.

• • • • • • •

"It may be noted at this point that the defendant is 'Department of Revenue.' The Department of Revenue is an arm of the State and may not be sued, because the constitution of Illinois provides that the State shall never be made a defendant in any court of law or equity. (Art. IV, Sec. 26). This provision of the constitution has been construed to apply to the Department of Public Works and Buildings, Department of Public Welfare, the Illinois National Guard, and others. A department of State government is commonly known as a part and division of the government, and it is recognized by State and Federal authorities. A full review of the authorities sustaining this position will be found in Noorman v. Department of Public Works and Buildings, 366 Ill.

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216; Posinski v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co. 376 Ill. 346, 350; Monroe v. Collins, 393 Ill. 553, 558.

"In view of the foregoing the judgment of the circuit court in dismissing the complaint is affirmed."

The result of the above decision is that the administrative agency may arbitrarily refuse to give a citizen a hearing and may arbitrarily demand that he pay any amount designated by the administrative agency (as in the case at bar) and the citizen is helpless and remediless, for the administrative agency cannot be made a defendant. This is a perfect example of lack of "due process of law" in direct violation of the 14th Amendment to the Constitution of the United States.

The requirement of "due process of law" is stated succinctly in *Truax* v. *Corrigan,* 257 U. S. 312, wherein this Court said:

"The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

In *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio,* 301 U. S. 292, the Supreme Court of the United States reversed the decision of a state administrative agency, and at pages 304-305 said:

"Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. West

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Ohio Gas Co. *v.* Public Utilities Comm'n, (No. 1) *supra*, p. 70; West Ohio Gas Co., *v.* Public Utilities Comm'n, No. 2; Los Angeles Gas & Electric Corp. *v.* Railroad Commission, 289 U. S. 287, 304. Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. *v.* United States, 298 U. S. 38, 73) of a fair and open hearing be maintained in its integrity. Morgan *v.* United States, 298 U. S. 468, 480, 481; Interstate Commerce Comm'n *v.* Louisville & N. R. Co., *supra;* the right to such a hearing is one of the 'rudiments of fair play' (Chicago, M. & St. P. Ry. Co. *v.* Polt, 232 U. S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement. West Ohio Gas Co. *v.* Public Utilities Comm'n (No. 1), (No. 2), *supra;* Brinkeroff-Faris Co. *v.* Hill, 281 U. S. 673, 682, Cf. Norwegian Nitrogen Co. *v.* United States, *supra.* There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

The Civil Administrative Code of Illinois created 13 Departments. Section 3 thereof (Ill. Rev. Stat. Chap. 127, Sec. 3) provides:

"Departments of State government are created as follows:

The Department of Finance;
The Department of Agriculture;
The Department of Labor;
The Department of Mines and Minerals;
The Department of Public Works and Buildings;
The Department of Public Welfare;
The Department of Public Health;
The Department of Registration and Education;

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The Department of Conservation;
The Department of Insurance;
The Department of Public Safety;
The Department of Revenue;
The Department of Aeronautics."

The Department of Revenue is an agency which administers and collects many types of taxes, and issues and revokes licenses in connection therewith, some of which are the following:

1. Retailer's Occupation Tax (Ill. Rev. Stat. 1947, Chap. 120, Secs. 440-453).
2. Oil Inspection Tax (Ill. Rev. Stat. 1947, Chap. 104, Secs. 1-18).
3. Gas Tax (Ill. Rev. Stat. 1947, Chap. 120, Secs. 467, 16-467.30).
4. Car Tax (Ill. Rev. Stat. 1947, Chap. 120, Secs. 372.1-372.12a).
5. Electricity Tax (Ill. Rev. Stat. 1947 Chap. 120, Secs. 468-481a).
6. Cigarette Tax (Ill. Rev. Stat. 1947, Chap. 120, Secs. 453.1-453.30).
7. Messages Tax (Ill. Rev. Stat. 1947, Chap. 120, Secs. 467.1-467.15).
8. Motor Fuel Tax (Ill. Rev. Stat. 1947, Chap. 120, Secs. 417-434).

Thus, the Department of Revenue has been placed in control and determines whether a citizen may or may not carry on certain types of business.

The provision that "The State of Illinois shall never be made defendant in any court of law or equity" has been in the Illinois Constitution since 1870, and suits against "Departments" as defendants have been sustained in thousands of cases. Some of the recent cases which were before the Supreme Court of Illinois are the following:

Anderson v. *Department of Finance*, 370 Ill. 225 (1938);
Smith Oil Co. v. *Department of Finance*, 371 Ill. 405 (1939);

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Mallen Co. v. *Department of Finance*, 372 Ill. 598 (1940);
Hoffman & Morton Co. v. *Department of Finance*, 373 Ill. 116 (1940);
Diogenes v. *Department of Finance*, 377 Ill. 15 (1941);
Warshawski & Co. v. *Department of Finance*, 377 Ill. 165 (1941);
Superior Coal Co. v. *Department of Finance*, 377 Ill. 282 (1941);
Feldstein v. *Department of Finance*, 377 Ill. 396 (1941);
Clauson v. Department of Finance, 377 Ill. 399 (1941);
Dubin v. *Department of Registration and Education*, 380 Ill. 57 (1942), involving a license;
Standard Oil Co. v. *Department of Finance*, 383 Ill. 136 (1943);
Butler Mfg. Co. v. *Department of Finance*, 383 Ill. 220 (1943);
Fashion Built Cloak Mfg. Co. v. *Department of Finance*, 383 Ill. 253 (1943);
Busford v. *Department of Registration and Education*, 390 Ill. 601 (1945), involving a license;
Tatz v. *Department of Finance*, 391 Ill. 131 (1945);
Dubin v. *Department of Registration and Education*, 396 Ill. 276 (1947), involving a license;
Deutsch v. *Department of Insurance*, 397 Ill. 218 (1947), involving a license;
Snite v. *Department of Revenue*, 398 Ill. 41 (1947).

It is clear that Article IV, Section 26 of the Illinois Constitution of 1870, which provides that the State of Illinois shall never be a defendant, was aimed to prevent recovery of money or property from the State, but when an agency of the State is made a defendant, the only object in doing so is to compel the agency to bring up the administrative record to the court for review, as is the situation in the case at bar.

The principle that a State may not be sued is not questioned by the Appellant, but a State may not place control and licensing authority in an administrative agency and at the same time prohibit a citizen from resorting to a court

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when the citizen is deprived of his livelihood by the arbitrary and capricious action of the agency, without a hearing and without an opportunity to be heard, as in the case at bar; and if the citizen acts without a license he is subjected to a fine of $5,000.00 and one to five years in the penitentiary.

The interpretation of Article IV, Section 26, of the Illinois Constitution by the Supreme Court of Illinois in the case at bar is repugnant to the 14th Amendment to the Constitution of the United States. It is well settled that the Supreme Court of the United States has jurisdiction by appeal where the highest court of a state holds that a provision of the State Constitution is valid notwithstanding that it conflicts with the Constitution of the United States. Thus, in the *Railroad Company* v. *Rock*, 4 Wallace 177, 181, 71 U. S. 177, 181, this Court laid down the following succinct rule:

> "It must be the Constitution or some law of the State, which impairs the obligation of the contract, or which is otherwise in conflict with the Constitution of the United States; and the decision of the State court must sustain the law or Constitution of the State in the matter in which the conflict is supposed to exist, or the case for this court does not arise."

The above was cited and quoted with approval in *New Orleans Waterworks Company* v. *Louisiana Sugar Refining Company*, 125 U. S. 18, 30; *St. Paul, Minneapolis and Minnetoba Railway Co.* v. *Todd County*, 142 U. S. 282, 286.

It is therefore clear that the Supreme Court of the United States has jurisdiction on appeal in the case at bar.

(b) State Statute the Validity of Which Is Involved

Article IV, Section 26 of the Illinois Constitution provides: "The State of Illinois shall never be made defendant in any court of law or equity."

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The Supreme Court of Illinois in its opinion in the case at bar recites as follows (403 Ill. 148, 149, 153-154):

> "It may be noted at this point that the defendant is 'Department of Revenue.' The Department of Revenue is an arm of the State and may not be sued, because the Constitution of Illinois provides that the State shall never be made a defendant in any court of law or equity. (Art. IV, Sec. 26.) This provision of the constitution has been construed to apply to the Department of Public Works and Buildings, Department of Public Welfare, the Illinois National Guard, and others. A department of State government is commonly known as a part and division of the government and it is recognized by State and Federal authorities. A full review of the authorities sustaining this position will be found in Noorman *v.* Department of Public Works and Buildings, 366 Ill. 216; Posinski *v.* Chicago, Milwaukee, St. Paul and Pacific Railroad Co., 376 Ill. 346, 350; Monroe *v.* Collins, 393 Ill. 553, 558.
>
> "In view of the foregoing the judgment of the circuit court in dismissing the complaint is affirmed."

The result of the above decision is that the administrative agency may arbitrarily refuse to give a citizen a hearing and may arbitrarily demand that he pay any amount designated by the administrative agency (as in the case at bar) and the citizen is helpless and remediless, for the administrative agency cannot be made a defendant. This is a perfect example of lack of "due process of law" as guaranteed by the 14th Amendment of the Constitution of the United States. *Truax* v. *Corrigan*, 257 U. S. 312; *Ohio Bell Telephone Company* v. *Public Utilities Commission of Ohio*, 301 U. S. 292.

(c) Dates of Judgment and of Appeal

The opinion of the Supreme Court of Illinois in this case was filed on the 19th day of January, 1949, and a petition

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for rehearing was filed in the Supreme Court of Illinois on the 29th day of January, 1949, in accordance with Rule 44 of the Supreme Court of Illinois. Said petition for rehearing was denied by the Supreme Court of Illinois on the 11th day of May, 1949, and the mandate of the Supreme Court of Illinois was issued to the Circuit Court of Cook County, Illinois, on the 20th day of May, 1949.

The application for appeal was presented to the Chief Justice of the Supreme Court of Illinois on the 21st day of June, 1949.

(d) Manner in Which Federal Questions Were Raised

The Federal question was raised on the pleadings. In view of the fact that the opinion of the Snpreme Court of Illinois completely misstates the contents of the pleadings, we find it necessary to set out the Complaint *verbatim* so that this Honorable Court may have the full picture of the facts.

The present case is governed by the Illinois Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 120, Sec. 265) which provides that:

> "This Act shall apply to and govern every action to review judicially a final decision of any administrative agency where the Act creating or conferring power on such agency, by express reference, adopts the provisions of this Act. *In all such cases, any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof.*" (Emphasis ours.)

Section 9(a) of the Illinois Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 110, Sec. 272) provides:

> "The complaint shall contain a statement of the decision or part thereof sought to be reviewed. It shall specify whether the transcript of evidence, if any, or what portion thereof, shall be filed by the agency as part of the record."

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The complaint of the Plaintiff-Appellant, omitting its title, recited as follows (Record 3-6):

"Now comes Isadore M. Krachock, plaintiff, by Harry G. Fins, his attorney, and complains against the Department of Revenue, an administrative agency of the State of Illinois, defendant, alleging as follows:

"1. During the years of 1933 to 1943, Isadore M. Krachock, plaintiff herein, was a licensed Distributor of Motor Fuel in Illinois, conducting his business at 4530 West Grand Avenue and 5915 Rogers Avenue, in the City of Chicago, County of Cook and State of Illinois, under the name of Lexington Oil Company.

"2. During said years of 1933 to 1943, the plaintiff was duly bonded in various sums up to $25,000.00 with the Equity Mutual Insurance Company as surety.

"3. During said years of 1933 to 1943, the Department of Revenue (then denominated as Department of Finance) examined, checked and audited the books, records and accounts of the plaintiff at 4530 West Grand Avenue and at 5915 Rogers Avenue, Chicago, Cook County, Illinois.

"4. Due to the general shortage of gas and oil during World War II, the plaintiff, in 1943, voluntarily surrendered his license as a Distributor of Motor Fuel in Illinois, at which time the plaintiff was bonded in the sum of $25,000.00 with the Equity Mutual Insurance Company as surety.

"5. In 1943, the defendant claimed from the plaintiff the sum of $742.59, which claim was at all times denied by the plaintiff.

"6. From 1943 to and including the present time, the defendant did not file any suit against the plaintiff or the Equity Mutual Insurance Company, his surety, to recover said alleged amount of $742.59 or any part thereof.

"7. On February 6, 1948, the plaintiff filed with the Department of Revenue, at its office located at 160 North

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La Salle Street, Chicago, Cook County, Illinois, on a form furnished by the Department of Revenue, an Application for license to transact business as a Distributor of Motor Fuels within the State of Illinois.

"8. On February 17, 1948, the Department of Revenue advised the plaintiff in writing rejecting his application on the sole ground that the plaintiff was indebted to the State of Illinois in the sum of $742.59

"9. On March 5, 1948, the plaintiff, through Harry G. Fins, his attorney, wrote to the defendant:

> 'This is to advise you that Mr. Krachock denies that he is indebted to the State of Illinois in the amount of $742.59 or any other sum.
>
> 'On behalf of Mr. Krachock I hereby request that this matter be set for hearing and that you present legal evidence of the alleged indebtedness of Mr. Krachock in the sum of $742.59 to the State of Illinois.'

"10. On March 9, 1948, the defendant advised the plaintiff in writing that the Department of Revenue refused either to set a hearing or to issue to the plaintiff a license as a Distributor of Motor Fuels in Illinois.

"11. *Plaintiff desires a judicial review of the decision of the Department of Revenue refusing a hearing to the plaintiff and refusing to issue a license to the plaintiff.*

"12. *Said decision of the Department of Revenue which was rendered without a hearing and without an opportunity to be heard is in direct violation of due process of law as guaranteed to the plaintiff* by Article 2, Section II of the Illinois Constitution of 1870 and *the 14th Amendment to the Constitution of the United States.*

"13. The Department of Revenue, defendant herein, is hereby requested to file an Answer in accordance with the law in such cases made and provided. By virtue of the fact that the defendant rendered its decision without holding any hearing and by refusing the plain-

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tiff's request for a hearing, the following shall be filed by the Department of Revenue as part of the record:

"(1) Application of Isadore M. Krachock for a license to transact business as a Distributor of Motor Fuels within the State of Illinois, dated February 6, 1948.

"(2) Refusal by Department of Revenue, addressed to Isadore M. Krachock, dated February 17, 1948.

"(3) Request by Harry G. Fins, attorney for Isadore M. Krachock, that matter be set for hearing for presentation of legal evidence, dated March 5, 1948.

"(4) Refusal by Department of Revenue to set a hearing and refusal to issue license, dated March 9, 1948, and addressed to Harry G. Fins, attorney at law, for Isadore M. Krachock.

"Plaintiff prays that the said record be judicially reviewed and that the decision of the Department of Revenue, a statement of which is hereinabove set out, be reversed, and that the plaintiff be granted such other and further relief as he is entitled under the law." (Emphasis ours).

The defendant filed the following motion (R. 14-15):

"Now comes Paul C. Rosenquist, Director of Revenue of the Department of Revenue of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, and enters his special, limited and restricted appearance for the sole purpose of challenging the jurisdiction of this court in the above entitled cause, and moves the court to quash the complaint and to dismiss the cause • • •

"Wherefore, the defendant, on account of the want of jurisdiction, averred, moves this Honorable Court that the complaint be quashed and the proceedings dismissed."

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The Plaintiff filed objections to said motion of Defendant (R. 17-19) and thereafter the following judgment was entered (R. 21):

> "On motion of George F. Barrett, Attorney General for the State of Illinois, to quash the complaint and to dismiss the cause, and on written objections filed thereto by the plaintiff, and the court having considered the complaint, motion of defendant and the written objections thereto by plaintiff,
> "It is hereby ordered that said motion of defendant be and is hereby sustained and the complaint is quashed and the suit dismissed at plaintiff's costs, to the entry of which order the plaintiff objects and excepts."

Opinion

The opinion of the Supreme Court of Illinois, which is herewith attached as an Appendix, contains so many statements which are directly contrary to the Record that we deem it our duty to call same to the attention of this Honorable Court:

1.

The opinion erroneously states that the Complaint did not request from the Department of Revenue any of the record before February 6, 1948. An examination of the record, on the contrary, shows that *the Complaint requested the complete record and specified certain items which were to be included in that complete record.*

Section 9(b) of the Illinois Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 110, Sec. 272) provides:

> "(b) (Answer) Except as herein otherwise provided, *the administrative agency shall file an answer which shall consist of* the original or a certified copy of *the entire record* of proceedings under review, including such evidence as may have been heard by it and the findings and decisions made by it. By order of court or by stipulation of all parties to the review, the record

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may be shortened by the elimination of any portion thereof. If the complaint specifies that none or only a part of the transcript of evidence shall be filed as part of the answer and if the administrative agency or any other defendant objects thereto, the court shall hear the parties upon this question, and make a finding as to whether all, or if less than all, what parts of the transcript shall be included in the answer." (Emphasis ours).

It should be noted with care that:

(1) There was no order of court to eliminate any portion of the record.

(2) There was no stipulation to eliminate any portion of the record.

(3) There was no objection on the part of the administrative agency to the record as requested by the complaint.

(4) The trial court did not hear the parties or make any findings as to what parts of the transcript shall be included in the answer.

The Complaint requested the complete record and specified certain items which were to be included in that complete record. That was the clear understanding of the plaintiff and of the defendant. The request in the Complaint reads as follows (R. 5-6):

> "*The Department of Revenue, defendant herein, is hereby requested to file an Answer in accordance with the law in such cases made and provided.* By virtue of the fact that the defendant rendered its decision without holding any hearing and by refusing the plaintiff's request for a hearing, *the following shall be filed* by the Department of Revenue *as a part of the record:*
>
> "(1) Application of Isadore M. Krachock for a license to transact business as a Distributor of Motor

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Fuels within the State of Illinois, dated February 6, 1948.

"(2) Refusal by Department of Revenue, addressed to Isadore M. Krachock, dated February 17, 1948.

"(3) Request by Harry G. Fins, attorney for Isadore M. Krachock, that matter be set for hearing for presentation of legal evidence, dated March 5, 1948.

"(4) Refusal by Department of Revenue to set a hearing and refusal to issue license, dated March 9, 1948, and addressed to Harry G. Fins, attorney at law, for Isadore M. Krachock."

It is thus clear that the Complaint requested a complete record and specified certain items which were to be included in that complete record. *The plaintiff could not possibly produce any part of the record, because the record is and always has been within the exclusive control and possession of the administrative agency. On the other hand, the defendant, Department of Revenue, which had the record, did not produce any record whatsoever as was required of the agency by the Administrative Review Act.*

2.

The opinion contains the following statement which is directly contrary to the record:

"It is alleged by appellant that the Department did not file an answer in conformity with the requirements of the law, which provides that the answer shall consist of the record of the entire proceedings under review, but that, in part, no doubt, was because the plaintiff did not require a record of anything prior to February 6, 1948. The appellant then made a motion that the answer be not considered and judgment rendered for the plaintiff, but the court overruled his motion, and carried it back to the complaint, quashed the complaint, and dismissed the plaintiff's suit."

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The record clearly shows (R. 14-15) that the defendant, *Department of Revenue, did not file an Answer but filed a motion.* The document filed was entitled "*Motion*" and recited (R. 14): "Now comes Paul C. Rosenquist, Director of Revenue of the Department of Revenue, of the State of Illinois, by George F. Barrett, Attorney General of the State of Illinois, • • • and *moves the court* to quash the complaint and to dismiss the cause, and as and for the grounds of *said motion,* this respondent shows unto the court: • • •" Said motion concludes that the defendant "*moves this honorable court* that the complaint be quashed and the proceedings dismissed." The plaintiff did not file any motion but filed "Objections by Plaintiff to Motion of Defendant" (R. 17-19) in which the plaintiff, among other things, said: "Plaintiff denies each and every allegation contained in the defendant's motion." The order of the Circuit Court, which was entered, reads as follows:

> "On motion of George F. Barrett, Attorney General for the State of Illinois, *to quash the complaint* and to dismiss the cause and on *written objections filed thereto by the plaintiff,* and the court having considered the complaint, *motion of defendant* and the *written objections thereto by plaintiff,*
>
> "It is hereby ordered that said *motion of defendant be and is hereby sustained* and the complaint is quashed and the suit dismissed at plaintiff's costs, to the entry of which order the plaintiff objects and excepts." (Emphasis ours).

Thus, it is clear that the *defendant* did not file an Answer but *filed a motion* and that the *Plaintiff-Appellant did not make any motion and there was nothing to carry back to the complaint.*

The opinion of the Supreme Court of Illinois held that the trial court properly quashed the complaint and dismissed the suit, and the plaintiff-appellant then filed a peti-

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tion for rehearing, in accordance with Rule 44 of the Supreme Court of Illinois, in which he maintained that "The holding of this court (Supreme Court of Illinois) denies the plaintiff "Due Process of Law" as guaranteed to him by the 14th Amendment to the Constitution of the United States."

(e) The Questions Involved Are Substantial

The Illinois Motor Fuel Tax law provides that no person shall act as a distributor of motor fuel within Illinois without first securing a license from the Department of Revenue (Ill. Rev. Stat. 1947, Chap. 120, Sec. 417-419). The same statute provides that any person who acts as a distributor without a license shall be punished by a fine not to exceed $5,000.00 or by imprisonment in the penitentiary for not less than one year nor more than five years (Ill. Rev. Stat. 1947, Chap. 120, Sec. 431). The Illinois Motor Fuel Tax law specifically provides that the Illinois Administrative Review Act is applicable thereto (Ill. Rev. Stat. 1947, Chap. 120, Sec. 432(a)). The Illinois Administrative Review Act defines an administrative agency as including "Department" and further provides that in all cases to which the Administrative Review Act is applicable "any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed." (Ill. Rev. Stat. 1947, Chap. 110, Sec. 264-265). The Illinois Administrative Review Act further provides that the administrative agency (in the present case being the Department of Revenue) must be made a defendant (Ill. Rev. Stat. 1947, Chap. 110, Sec. 271). Rule 71 of the Supreme Court of Illinois likewise requires that the administrative agency be named as a defendant. (Ill. Rev. Stat. 1947, Chap. 110, Sec. 259.71).

The Supreme Court of Illinois in the case at bar holds that by virtue of the fact that Article IV, Section 26, of the Illinois Constitution provides that: "The State of Illinois shall

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never be made defendant in any court of law or equity," no suit can be brought against the Department of Revenue which is in charge of the issuance of Motor Fuel Distributors' licenses, regardless how grievous or how arbitrary the action of the Department of Revenue may be. The result of this decision is that the administrative agency may arbitrarily refuse to give a citizen a hearing and may arbitrarily demand that he pay any amount designated by the administrative agency (as in the case at bar) and the citizen is helpless and remediless, for the administrative agency cannot be made a defendant. This places the Illinois Department of Revenue beyond the pale of the law and in fact, beyond the possibility of judicial correction, and deprives the citizen of his elementary rights in direct violation of "due process of law" as guaranteed by the 14th Amendment to the Constitution of the United States. Under the decision of the Supreme Court of Illinois in the case at bar, the Department of Revenue (or any of the 13 "Departments" in the State of Illinois) can exercise arbitrary and dictatorial powers without judicial control whatsoever. This decision of the Supreme Court of Illinois makes one appreciate the protection afforded a citizen by Article VI of the Constitution of the United States which provides: "This Constitution and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

The principle that a State may not be sued is not questioned by the Appellant. But a State may not place control and licensing authority in an administrative agency and at the same time prohibit a citizen from resorting to a court when the citizen is deprived of his livelihood by the arbitrary and capricious action of the agency, without a hearing and without an opportunity to be heard, as in the case at bar, and if the citizen acts without a license he is subjected

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to a fine of $5,000.00 and one to five years in the penitentiary.

In conclusion, it is of interest to note that Rule 71 of the Supreme Court of Illinois requires that the administrative agency from whose decision a review is sought be named as a defendant, whereas by the decision in the case at bar the Supreme Court of Illinois holds that the administrative agency cannot be made a defendant. The result is that the citizen is deprived of his right to a hearing no matter what procedure he attempts to follow.

Respectfully submitted,

HARRY G. FINS,
WALTER F. DODD,

Attorneys for Appellant,
77 W. Washington Street,
Suite 1217,
Chicago 2, Illinois.

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APPENDIX

OPINION OF SUPREME COURT OF ILLINOIS

No. 30698

ISADORE M. KRACHOCK, *Appellant*,

v.

DEPARTMENT OF REVENUE, *Appellee*

403 Ill. 148-154

Opinion filed January 19, 1949—Rehearing denied May 11, 1949.

Mr. Justice Gunn delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County quashing a complaint purportedly filed under the Administrative Review Act, and dismissing the plaintiff's suit.

Plaintiff, Isadore M. Krachock, filed his complaint against the Department of Revenue to compel it to issue a license to him as a distributor under the Motor Fuel Tax Act. (Ill. Rev. Stat. 1947, Chap. 120, Par. 417, et seq.) The complaint purports to be in accord with the Administrative Review Act (Ill. Rev. Stat. 1947, Chap. 110, Pars. 264-279, incl.) which authorizes a review of the final decisions of administrative boards or bureaus, when such decisions affect the rights, privileges or duties of the person appealing therefrom.

Section 2 of the Administrative Review Act provides that "any other statutory, equitable or common law mode of review of decisions of administrative agencies heretofore available shall not be employed after the effective date hereof;" and that all decisions made by administrative boards may be reviewed under the provisions of the Administrative Review Act where the act creating the board provides this manner of review by express reference to the act,

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and in this case the Motor Fuel Tax does so provide. However, the Administrative Review Act does not purport to give an independent remedy, or create any new cause of action, but merely provides a method of review, whereby challenged decisions of the administrative body may be subjected to a judgment of the court, as to its regularity and validity. It provides for reviews of the decisions of the board upon the record alone, as no additional evidence in support of, or in opposition to, any finding, order, determination, or decision of the administrative agency shall be heard by the court, and the findings and conclusions of the agency on questions of fact shall be held *prima facie* true and correct (Sec. 11). The act also provides that the pleadings shall consist of a complaint and an answer; that the complaint shall contain a statement of the decision sought to be reviewed, and shall specify whether the transcript of evidence, if any, or what portion thereof, shall be filed by the agency as a part of the record.

In the present case the complaint is a combination of ultimate facts alleged by the pleader, without producing the record thereof, and the remainder purporting to be the part of the record of the decision complained of. The first six allegations in the complaint are not supported by any record of the Department. These allegations relate to the length of time appellant was a distributor; that during such time he was bonded as required by statute; that throughout the period from 1933 to 1943 the Department of Revenue checked and audited his books and records, and notified plaintiff he was indebted in the sum of $742.59; that plaintiff voluntarily surrendered his license in 1943, and that defendant did not sue the plaintiff or his bondsmen for the alleged shortage.

The balance of the complaint alleges that on February 6, 1948, plaintiff filed with the Department of Revenue an application for a license as a distributor of motor fuel, and that on February 17, 1948, the Department of Revenue rejected his application on the sole ground he was indebted to the State; that on March 5, 1948, the plaintiff's attorney wrote the Department, advising it the plaintiff was not indebted to the State and requested a hearing; that on March 9, 1948, the Department wrote and advised plaintiff's attor-

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ney that it would not grant a hearing upon the question of issuing a license, and would not issue a license to applicant. It thus appears that appellant alleges matters prior to February 6, 1948, as independent, ultimate facts of his own knowledge, without bringing before the court, or requiring to be brought before the court, the record of the Department of Revenue. It is only matters occurring from and after February 5, 1948, of which the appellant requires a record of the Department of Revenue.

Fairly construed the complaint discloses that the plaintiff desires a hearing upon whether he owes the Department of Revenue $742.59, without requiring or producing the record of the Department. This was the issue upon which the license was refused.

The Brief of appellant admits that all of the facts stated in the complaint appear in the record, but he does not produce, or require any of the record before February 6, 1948, and does not comply with the plain words of the statute requiring the production of the material parts of the record for the disposition of his case. Section 3 of the Motor Fuel Tax Act provides: "No person who is in default to the State for monies due under this act for the sale, distribution or use of motor fuel shall receive a license either directly or indirectly to act as distributor." (Ill. Rev. Stat. 1947, Chap. 120, Par. 419).

The portion of the record of the Department set out in the complaint, with a requirement for its production, discloses that the sole ground for refusal of the application was the fact appellant was indebted to the State of Illinois. Appellant seems to think this is not specific enough to justify a refusal, because the Department of Revenue collects many different kinds of taxes from different tax units, but the Administrative Review Act (Sec. 11) provides that the finding of fact by an administrative body is *prima facie* correct; and besides, the plaintiff's complaint shows that after an audit of the records of the plaintiff, as a motor fuel distributor in 1943, the Department advised him he was indebted in the sum of $742.59, so there can be but little question that the Department made a finding of fact, and, based upon that, refused a license.

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The portion of the record set out in the complaint is not sufficient to require a review of the decision of the Department. When the license was refused because of nonpayment of a debt to the State of Illinois, the complaint should require the record of the action of the Department relating to such finding to be produced, and hence has failed to bring before the court an essential part of the record upon which the court could act, because the actions of the Department may only be reviewed upon the record made by it, without additional testimony. Since all the plaintiff has produced before the court is a record showing that appellant was denied a license because he had not made full settlement of the distributor's tax, one of the essential elements for determining the validity of the decision of the administrative board is absent. Without this portion of the record no review of the refusal of the license by the Department may be had. The act contemplates that every part of the record necessary to reviewing the decision must be made a part of the record, as the court may only act upon the record.

It is alleged by appellant that the Department did not file an answer in conformity with the requirements of the law, which provides that the answer shall consist of the record of the entire proceedings under review, but that in part, no doubt, was because the plaintiff did not require a record of anything prior to February 6, 1948. The appellant then made a motion that the answer be not considered and judgment rendered for the plaintiff, but the court overruled his motion, and carried it back to the complaint, quashed the complaint, and dismissed the plaintiff's suit.

The objection that the complaint does not state a cause of action, or a plea does not state a defense, may be raised at any time, either before or after judgment. (*Sargent Co.* v. *Baublis*, 215 Ill. 428; *Owens-Illinois Glass Co.* v. *McKibbin*, 385 Ill. 245). The complaint was fatally defective in that it appears there had been an audit of plaintiff's accounts and a determination made that he was indebted to the State, and it would be necessary to determine the correctness of the ruling of the Department before it would be required, under the statute, to issue a license. This can be reviewed only by examining the record of the Department.

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The plaintiff did not make a motion to amend his complaint, and therefore must stand or fall upon its contents.

We do not think the complaint is sufficient. We cannot review the refusal of the Department to issue the license demanded unless the record is produced to enable us to determine the essential element to plaintiff's relief, *viz.*, the invalidity of the finding that he owed money to the State of Illinois. The Administrative Review Act is an innovation and a departure from the common law, since it abolishes many of the common law remedies and points out the procedure to be followed to obtain relief, and it must be pursued to justify its application.

It may be noted at this point that the defendant is "Department of Revenue." The Department of Revenue is an arm of the State and may not be sued, because the Constitution of Illinois provides that the State shall never be made a defendant in any court of law or equity (Art. IV, Sec. 26). This provision of the constitution has been construed to apply to the Department of Public Works and Buildings, Department of Public Welfare, the Illinois National Guard, and others. A Department of State Government is commonly known as a part and division of the Government, and it is recognized by State and Federal authorities. A full review of the authorities sustaining this position will be found in *Noorman* v. *Department of Public Works and Buildings*, 366 Ill. 216; *Posinski* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 376 Ill. 346, 350; *Monroe* v. *Collins*, 393 Ill. 553, 558.

In view of the foregoing the judgment of the circuit court in dismissing the complaint is affirmed.

Judgment affirmed.

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